

GENERAL SERVICES ADMINISTRATION OFFICE OF INSPECTOR GENERAL

Recovery Act Report –
Robert A. Young Federal Building
Envelope Improvement Construction Project
Audit of PBS's Major Construction and Modernization
Projects Funded by the American Recovery and
Reinvestment Act of 2009
Audit Number A090172/P/R/12003

March 8, 2012





Date: March 8, 2012

Reply to: R. Nicholas Goco
Attn of: Deputy Assistant Inspector General
For Real Property Audits (JA-R)

Subject: Recovery Act Report – Robert A. Young Federal Building Envelope
Improvement Construction Project
Audit of PBS's Major Construction and Modernization Projects Funded by
the American Recovery and Reinvestment Act of 2009
Report Number A090172/P/R/12003

To: Robert A. Peck
Commissioner, Public Buildings Service (P)

As part of our oversight of the General Services Administration's (GSA) American Recovery and Reinvestment Act (Recovery Act) projects, we identified contracting violations related to the Construction Manager as Constructor (CMc) contract for the Robert A. Young Federal Building (RAY) envelope¹ improvement project that warrant your attention. Specifically:

- PBS effectively eliminated price competition as an award factor for the Construction Phase Services option of this contract;
- PBS did not adequately establish price reasonableness for construction phase work;
- PBS inappropriately increased the maximum order limitation of the underlying contract; and
- Funding for construction phase work was improperly obligated.

PBS Eliminated Price Competition for Construction Phase Services

When PBS awarded the subject CMc contract, planning for the project was ongoing and design work had not started. Despite this, PBS proceeded with the procurement. As a result, the scope of work was inadequately defined making it impossible to use price competition in awarding the Construction Phase Services. Further, when PBS finally delineated the full scope of work, it modified the contract without competition; nearly quadrupling the Guaranteed Maximum Price (GMP) for construction. Consequently,

¹ The Young Building is located in St. Louis, Missouri. Envelope physical components for this project include windows and the exterior façade.

PBS violated the requirements of both the Federal Acquisition Regulation (FAR) and the Competition in Contracting Act (CICA).

PBS Identified Project's Guaranteed Maximum Price for Initial Task Order Award

PBS awarded this CMc task order on July 29, 2009. This type of contract generally requires that the Design Phase Services be awarded at a firm-fixed price and that the Construction Phase Services be awarded as an option at a GMP. The design requirements should be developed to a degree of specificity that allows competing offerors to propose meaningful pricing. In addition, the proposed GMP must be evaluated along with pricing for design services and established at the initial contract award to comply with contracting requirements.²

In this case, a façade study was needed to ascertain the project's full scope of work, but had not been completed prior to issuance of the solicitation. Nevertheless, PBS elected to proceed with the procurement in order to ensure that the \$7 million³ in Recovery Act funding allocated to the project would be obligated before the August 1, 2009, deadline.⁴ PBS provided a preliminary scope of work to bidders and instructed them to use the Government's \$7 million GMP (the amount of available project funding) in pricing the Construction Phase Services when preparing their bids. In addition, PBS verbally informed potential bidders that the contract value could increase once the full scope of work was determined.

By instructing prospective bidders to use the PBS-identified GMP for construction, PBS limited any price competition to preconstruction costs which represented only 0.1 percent (\$8,200) of the total \$7,008,200 award value. In effect, PBS eliminated cost or pricing as an evaluation factor for the vast majority of the work. Source selection was based primarily on technical evaluation factors, with preconstruction costs given secondary consideration. Additionally, PBS violated FAR restrictions regarding the type of information that may be disclosed in a solicitation.⁵

The contracting officer indicated that this approach was used because it was one of the pricing options prescribed in the Region 6 CMc Multiple Award contract. Under CMc Method 3,

0-99% design documents will be provided to contractors. Contractors will submit a firm fixed price proposal for preconstruction phase services and

² Federal Acquisition Regulation (FAR) 52.217-5.

³ Recovery Act funds of \$26.322 million were originally allocated for the RAY Building. However, there were multiple projects within the building and only \$7 million were allocated for this work.

⁴ To ensure Recovery Act funds were obligated prior to their expiration, PBS established several obligation deadlines with target dates for project awards.

⁵ FAR 36.204 prohibits disclosure of exact pricing data. It states, "advanced notices and solicitations shall state the magnitude of the requirement in terms of physical characteristics and estimated price range."

agree to a GMP option for construction services provided by the Government. The GMP will be converted to a Firm Fixed price prior to 100% design complete.

However, subsequent to this task order award, PBS Central Office disallowed the use of this method as a procurement option.

Contract Modifications Represented Non-Competitive Unpriced Options

PBS awarded the contract knowing the scope of the Construction Phase would be increased and that this additional work would have to be given to the existing contractor. Since PBS had not fully defined the additional work or formally amended the requirement, its verbal notification that the contract value could increase constructively established an unpriced option for this work. PBS exercised this option after a consultant for the project's Architect-Engineer performed the façade study and determined the complete scope of work, which was estimated to cost \$26.3 million. Pursuant to the study's results, PBS issued two task order modifications⁶ that increased the quantity of work and the GMP. The GMP went from \$7 million to \$26.3 million; an increase of \$19.3 million or 376 percent.

This further violated FAR and CICA because the option was not evaluated as part of the initial competition and could not be executed at an amount specified in or reasonably determinable from the terms of the base contract.⁷

In effect, the option was awarded as a sole source procurement. Both FAR⁸ and the General Services Acquisition Manual⁹ require that the statutory authority permitting the use of other than full and open competition be cited when exercising an unpriced option. At the time of our review, the contract file did not contain any documentation citing this authority, and the circumstances do not appear to adequately support such a determination.

Price Reasonableness Determinations Were Inadequate

PBS did not make an adequate determination of price reasonableness regarding this task order. The contracting officer did prepare a determination for the initial award based on the bids received and a comparison to a government estimate. However, as noted above, there was no actual price competition for the majority of the work, and the independent government estimate (IGE) was not prepared in accordance with PBS estimating requirements. Finally, the contract modifications were not competed nor were IGEs prepared for them.

⁶ Modification PS03 dated December 30, 2009, for \$9,040,856; and Modification PS05 dated March 17, 2010, for \$10,266,403.

⁷ FAR 17.207(f)

⁸ FAR 6.302

⁹ General Services Acquisition Manual 536.270

In general, price reasonableness for construction contracts can be established through price competition and/or through a cost comparison using the IGE. According to FAR 36.203¹⁰, the Government is required to prepare the IGE in as much detail as though the Government were competing for award. However, since the initial scope of work was incomplete, the IGE could not meet this criterion. PBS was not fully aware of the extent of the work required until the façade study was completed four months after task order award. Further, since PBS instructed all bidders to use a GMP of \$7 million in their proposals, price competition was not used to establish price reasonableness.

PBS also failed to establish price reasonableness for the modifications that increased the GMP after the initial task order award. PBS did not prepare an IGE for this work; instead, a consultant for the Architect-Engineer firm who performed the façade study prepared the estimates. This violates *P-120 Project Estimating Requirements for the Public Building Service* that requires that government estimates be completed by an internal government estimator or an independent cost estimator who is not affiliated with the design or the CMc firm. Further, since PBS did not re-compete the order or renegotiate with the winning contractor, there is little assurance that agreed-upon prices are fair and reasonable.

PBS Inappropriately Increased the Underlying CMc IDIQ Contract Maximum Order Limitation

The contracting officer awarded the RAY CMc task order under an Indefinite Delivery Indefinite Quantity (IDIQ) contract that did not have sufficient capacity within its maximum order limitation (MOL) to cover the full project cost. While the MOL could have covered the initial \$7 million award, it was insufficient to cover the increases that were a result of the re-defined project scope. The contracting officer should have taken this into account and considered other contractors under this IDIQ contract or alternative procurement vehicles. Instead, PBS opted to issue modifications to increase the contract's MOL from \$40 million to \$72 million.

PBS awarded the initial task order on July 29, 2009. By August 2009, the IDIQ contract had reached 94 percent of its \$40 million MOL. This meant there was insufficient capacity to complete the façade improvements. Therefore, on September 3, 2009, PBS increased the MOL to \$50 million via modification PC10. On December 29, 2009, barely half way through its 5-year performance period, total task order awards under this IDIQ contract approached this revised order limit. PBS then issued modification PS11 increasing the MOL by an additional \$22 million.

These modifications were processed in a manner that ignored PBS's guidance regarding MOL increases. In a July 21, 2009, memorandum to PBS Regional Procurement Officers, the Deputy Assistant Commissioner for the Office of Acquisition Management indicated that unused capacity from a prior year may be used to increase

¹⁰ Government estimate of construction costs.

a MOL if supported by a written determination. In this case, PBS made no such determination.

PBS did prepare justifications for the use of other than full and open competition for each MOL increase. These justifications, approved by regional management, cited the Recovery Act as creating an urgent and compelling need to augment the MOL. However, Recovery Act Implementation Guidance issued by the Office of Management and Budget¹¹ explicitly states that the Recovery Act does not constitute a sufficient justification to support award of federal contracts on a non-competitive basis, and that agencies are expected to follow the same laws, principles, procedures, and practices in awarding non-competitive contracts with Recovery Act funds as they do when using other funding sources.

PBS Improperly Obligated Funds for Construction Phase Services

PBS improperly obligated funding for Option 1 Construction Phase Services when it awarded the initial CMc task order. The task order only established the GMP and did not actually exercise the construction phase option or create a liability for these services. Therefore, an obligation did not occur and should not have been recorded.

The Government Accountability Office defines an obligation as “a definite commitment that creates a legal liability for the government for the payment of goods and services ordered or received.” On a CMc contract, this usually occurs when the base contract is awarded and when the construction option is exercised. In this instance, the option was eventually exercised via a series of subsequent modifications. However, PBS prematurely obligated construction funding at the initial task order award in order to meet GSA’s Recovery Act obligation deadlines.

Conclusion

PBS’s procurement methodology for this CMc contract may have unnecessarily put the project at risk. The base task order was awarded without a fully-developed scope of work and without price competition for the Construction Phase Services that represented an overwhelming majority of the contract value. Additionally, subsequent modifications which substantially increased the scope were awarded non-competitively as an unpriced option. Further, to accommodate the increase in scope, PBS ignored its own procurement guidance and inappropriately increased the MOL of the underlying IDIQ contract. These actions expose GSA to potential challenges from third parties and unsuccessful bidders.

¹¹ Updated Implementing Guidance for the American Recovery and Reinvestment Act of 2009 dated February 18, 2009.

Recommendations

We recommend that the Commissioner of the Public Buildings Service:

1. Review the Region 6 Multiple Award CMc IDIQ contract to determine whether it should be modified or terminated, as its provisions include contract clauses that violate requirements of the Competition in Contracting Act and the Federal Acquisition Regulation;
2. Take measures to ensure that PBS contracting personnel follow existing procurement regulations and guidance to establish reasonable pricing for Recovery Act modernization and construction projects; and
3. Ensure that project teams have proper guidance and training to properly obligate funding for future construction contract actions.

Management Comments

In its response to the draft report, PBS concurred with the OIG findings and accepted the report recommendations. PBS's response is included in its entirety as Attachment A to this report.

We appreciate the support that has been provided throughout this audit. If you have any questions concerning this report, please contact me at (202) 219-0088.

Sincerely,



R. Nicholas Goco
Deputy Assistant Inspector General for Auditing
Real Property Audit Office (JA-R)

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Management Comments



GSA Public Buildings Service

MAR 05 2012

MEMORANDUM FOR R. NICHOLAS GOCCO
DEPUTY ASSISTANT INSPECTOR GENERAL FOR REAL
PROPERTY (JA-R)

FROM ROBERT A. PECK 
COMMISSIONER (P)
PUBLIC BUILDINGS SERVICE

SUBJECT Recovery Act Report – Robert A. Young Federal Building
Envelope Improvement Construction Project - Audit of PBS's
Major Construction and Modernization Projects Funded by the
American Recovery and Reinvestment Act of 2009
Audit Number A090172

PBS appreciates the opportunity to comment on the subject draft audit report. A project for envelope improvements of the Robert A. Young Federal Building was awarded under the American Recovery and Reinvestment Act of 2009 (Recovery Act) and is meeting the intent of the Recovery Act by putting people back to work, strengthening the economy, and meeting energy conservation goals.

The draft report contains three recommendations:

1. Review the Region 6 Multiple Award CMc IDIQ contract to determine whether it should be modified or terminated, as its provisions include contract clauses that violate requirements of the Competition in Contracting Act and the Federal Acquisition Regulation;
2. Take measures to ensure that PBS contracting personnel follow existing procurement regulations and guidance to establish reasonable pricing for Recovery Act modernization and construction projects; and
3. Ensure that project teams have proper guidance and training to properly obligate funding for future construction contract actions.

In response to Recommendation 1, the Region 6 Construction Manager as Constructor (CMc) contract allowed for the award method used when the task order was awarded. The use of this method of award (referred to as "Method 3") was stopped following an inquiry by PBS's Office of Acquisition Management and Policy in March 2010.

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Discussions were subsequently held between the Office of Acquisition Management and Policy and Central Office's General Counsel's Office. Based on these discussions, Region 6 drafted a new Indefinite Delivery Indefinite Quantity contract vehicle which does not include "Method 3" as an award option. Accordingly, we believe these actions and this new contract vehicle will satisfy Recommendation 1.

In response to Recommendation 2, PBS issued Procurement Instructional Bulletin number PIB 11-03, concerning CMC internal controls on February 8, 2011. The bulletin requires regional reviews of all CMC contract files. PBS is also currently developing guidance on analyzing cost and pricing data, negotiating reasonable prices and awarding contract actions. This guidance will include oversight through established regional contract reviews.

In response to Recommendation 3, Region 6 is developing training to explain the appropriate use of and the legal reasoning behind the new IDIQ CMC contract. The training will be required by all project teams. Additionally, new online training for the use of CMC contracts has been developed by the Office of Acquisition Management and Policy. This training is mandatory for all acquisition personnel who work on capital construction projects. All Region 6 project teams are required to take this training in addition to the regional training previously mentioned. Accordingly, we believe these actions will satisfy Recommendation 3.

Please note that a more comprehensive response may follow upon issuance of the final audit report or as further information comes to our attention. Should you or your staff have any questions, please contact Christine Kelly at (202) 501-5081.

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Background, Objective, Scope and Methodology

Background

The American Recovery and Reinvestment Act of 2009 (Recovery Act) provided the General Services Administration (GSA) with \$5.55 billion for the Federal Buildings Fund. In accordance with the Recovery Act, the GSA Public Buildings Service (PBS) issued these funds to convert federal buildings into High-Performance Green Buildings as well as to construct federal buildings, courthouses, and land ports of entry. The Recovery Act mandated that \$5 billion of the funds be obligated by September 30, 2010, and that the remaining funds be obligated by September 30, 2011. The GSA Office of Inspector General (OIG) is conducting oversight of the projects funded by the Recovery Act.

On July 29, 2009, PBS awarded a Construction Manager as Constructor task order for envelope improvements to the Robert A. Young Federal Building (RAY) in St. Louis, Missouri. The base task order was awarded for \$8,200 for preconstruction services, with an option for construction phase services at a Guaranteed Maximum Price (GMP) of \$7 million. PBS subsequently increased the project’s GMP to \$26.3 million. The envelope improvements were scheduled to be completed by the end of 2011.

Objective

The objective of the OIG’s Recovery Act oversight is to determine if PBS is planning, awarding, and administering contracts for major construction and modernization projects in accordance with prescribed criteria and Recovery Act mandates.

Scope and Methodology

To accomplish the objective we conducted fieldwork in the Heartland Region, reviewed the task order file and other pertinent project documents, met with project staff, and reviewed applicable guidance and regulations. The work for this report was performed while evaluating the award for Option 1 of the construction task order for the Robert A. Young Federal Building Envelope Improvement Project.

Except as noted below, we conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We

believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

The planning for this audit is based on the audit plan for oversight of the Recovery Act projects as well as review guidance being applied to all Recovery Act projects. A separate guide was not prepared for this project.

As this work was performed under the continuing oversight of all GSA Recovery Act projects, management controls are currently under assessment. Only those management controls discussed in the report have been assessed.

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